$3,720.00 in all. The costs of these proceedings will be paid by the defendant to the plaintiff and, if not previously paid, may be set off against the said sum of $3,720.00. I order the defendant to deposit Kelantan Grant for Land No. 2910 in Court within seven days of this order. I order that, in the event of payment into Court or to the defendant being made by way of redemption as hereby ordered, the said grant shall be delivered out to the plaintiff, and, in the like event, the defendant shall execute within seven days after such redemption a valid registrable transfer of the land to the plaintiff, and that in default of such execution the Assistant Registrar, Supreme Court, Kota Bharu, shall execute such a transfer on behalf of the defendant and the same shall be duly registered. I also order that the caveat now imposed on the land in question in the suit to protect the interests of the plaintiff be extended until the 3rd February, 1951, or prior presentation of a registrable transfer in favour of the plaintiff, and thereupon be removed. A draft of the formal order in this case is to be submitted for my approval.

Order accordingly.

SOONG CHEE KONG v. PUBLIC PROSECUTOR and NG SOON SUM AND ANOR. v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Taylor, J.) December 11, 1950]

[K.L. — Criminal Appeal Nos. 45 and 39 of 1950]

Customs Enactment, 1937, s. 106 — Forfeiture.

In all cases under the Customs Enactment the Magistrate has a discretion as to the forfeiture of goods or vehicles.

Beh Chang Hin v. Public Prosecutor(1) followed.

Public Prosecutor v. Nai Hor Par(3) not followed.

Principles of punishment in revenue cases explained and applied.

Cases referred to :—

(1) *Beh Chang Hin v. Public Prosecutor* (1950) M.L.J. 239.

(2) *Public Prosecutor v. Lee Ah Sam* (1949) M.L.J. 236.

(3) *Public Prosecutor v. Nai Hor Par* Ipoh Criminal Miscellaneous Application No. 11 of 1947 (unreported).

CRIMINAL APPEAL.

A. J. Bostock-Hill for the appellant in Criminal appeal No. 45 of 1950.

S. M. Yong for the appellant in Criminal Appeal No. 39 of 1950.

A. M. I. Austin (D.P.P.) for the respondent in both appeals.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — The appellant was convicted of the possession of uncustomed goods. The facts, briefly, are that the accused, who is a watch dealer, was stopped at a customs barrier with 646 watches in his car. After a long investigation the customs officers released 456 watches but prosecuted him in respect of the remaining 190, which were separately and differently packed. He was not charged with smuggling. The gist of the matter is this. The preventive men seize a suspected parcel and say : — "Duty has not been paid on this." If the sale records and duty receipts have not been kept systematically, it is virtually impossible to prove this negative proposition. The law, therefore, shifts the onus and requires the accused to prove that the duty has been paid — otherwise any dealer could defeat the revenue by breaking bulk, mixing smuggled with innocent goods, keeping only hazy records of sales and muddling his receipts. That was the position of this accused; probably he could not have been convicted of smuggling; just possibly the duty on these 190 watches had been paid. His offence is that he — a regular dealer in dutiable goods and therefore under a duty so to conduct his affairs as to protect the revenue — in breach of his duty muddled his affairs in such a manner as to afford facilities for dealing in smuggled goods. In particular, his muddle left it extremely doubtful whether duty had been paid on these 190 watches and this is the specific matter for which he was convicted.

The value of the 190 watches was stated to be $5,294. The duty was said to be 15% but only $555 was claimed. One or other of these figures is obviously wrong but both counsel accepted them. I have since been informed that the value was correctly stated but by a clerical error the duty was calculated at 10.5% instead of 15%, that the mistake was discovered before the end of the trial but that it was then considered too late to rectify it. Section 278 of the Code should have been applied.

The minimum fine is six times the duty. The Magistrate forfeited the 190 watches and, considering this a great deterrent, he imposed a fine of $3,500, in round figures, the minimum on the basis that the duty was $555.

There was ample evidence to prove the offence, so the conviction must be affirmed but the appeal was also against sentence, that is, in effect, against the forfeiture. The Deputy Public Prosecutor submitted that the Magistrate had considered forfeiture to be obligatory and that there was an unreported authority for that view. The point being of substance in this case and also of general importance, at the request of counsel I adjourned the hearing for the point to be fully argued.

On the resumption both counsel examined and compared the different provisions dealing with forfeiture, at some length, and I was requested to deliver a considered judgment on the various points raised. Mr. Bostock Hill, for the appellant, argued that the English Act is different from the local law in material respects and, in particular, that it is differently arranged — forfeiture of goods and forfeiture of vehicles being dealt with separately whereas in our Enactments they are dealt with together. He submitted that nowhere in the Enactment of 1937 does the expression "shall be forfeited" occur, though it is used in section 202 of the Act in relation to vehicles. He referred to *Beh Chang Hin*[1] and also to *Lee Ah Sam*[2], which supports the view that the words "liable to" in a penal statute mean "liable to not more than.....at the discretion of the Court."

Mr. Austin, for the Public Prosecutor, agreed that the English Act is materially different. He put forward a construction of the Enactment which he himself said was odd and led to harsh and unreasonable results but these could be mitigated by the High Commissioner. He relied on the unreported judgment in *Nai Hor Par's* case[3], where it is said that once a Magistrate has decided that goods are lawfully liable to seizure, then they must be forfeited.

In *Beh Chang Hin* (*supra*) at page 244 it was held that in Kedah forfeiture is not obligatory but the unreported case was not cited. Section 96 of the Kedah statute is word for word the same as section 106 of the Enactment and the respective provisions for seizure are very similar. These two cases cannot be reconciled. Where the authorities are in conflict it is necessary to decide the point on principle. The question is wholly one of construction of the statute and the principle is to give the words their ordinary meaning with reference to their context.

Part X of the Enactment gives the Customs Officers very wide powers of search, and enquiry. Section 94 provides generally for the seizure of goods, vessels and vehicles. Section 96 is important; it sets out seven sets of circumstances in which goods may be seized; perhaps clause (b) is the most helpful example for the present purpose; it provides that any goods landed, if not included in the manifest, shall be liable to seizure. Now a manifest generally consists of many sheets, each containing particulars of different lots of goods for different owners. Obviously it may turn out that by some clerical error, short-landing at a previous port of call, or one of a hundred other causes, perfectly innocent goods were not shewn in the manifest. Clause (g) provides that any dutiable goods .... discovered to have been concealed ..... shall be liable to seizure.

There is nothing whatever in this section about import duty or about offences; smuggling is dealt with in other sections. In my opinion the two examples are sufficient to establish that the law is intended to authorise, and does authorise, seizure on suspicion.

Section 106 (i) provides that all goods liable to seizure shall be liable to forfeiture and sub-section (ii) provides that where there is a prosecution the Magistrate may forfeit the goods, if :—

(a) an offence is proved; and also
(b) the goods were the subject matter of, or used in the commission of, the offence

regardless of whether anyone was convicted.

The point of this is that the evidence may prove an offence but may fail to prove that the accused is the person who committed it. Alleged smugglers often disclaim the goods; there are many other situations — that is merely one familiar example.

There is a further and very important point here which Magistrates are inclined to miss. Whether the accused is acquitted or convicted, he may not be the owner of the goods; if, although he is not the owner, the goods are forfeited on the spot, the owner is punished without having been heard, which is contrary to the fundamental principles of justice. If the owner is present he must be heard and if he is not present the matter must be adjourned to give him a reasonable opportunity to oppose the forfeiture. If he cannot be found of course, the Magistrate may proceed in his absence.

Section 108 provides that when any goods are seized, notice shall forthwith be given to the owner, unless he or his agent knows about it already. If there is no prosecution, or if there is a prosecution but the Magistrate does not forfeit, and if the goods are not claimed wihin one month, then they are forfeited automatically by operation of law. This section is not as clear as some others and has been misunderstood.

The words "if there is no prosecution" mean if no prosecution relevant to the goods is commenced. The department cannot start the case and then, if it is unfinished at the expiration of one month, claim the goods under Section 108 (ii). Once they decide to go to Court the goods are brought within the jurisdiction of the Court and must await disposal by the Court. The sub-section may however, cover the case where the prosecution is finished within the month and the Court has declined to forfeit — possibly to give an opportunity for a claim, as already explained; in that case, forfeiture by mere effluxion of time may still occur.

Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. If he does not release, he must refer the matter to Court.

The Court "examines" the matter; this is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience — as are maintenance proceedings. The claimant must allege that he is the owner of the goods and that they are not liable to forfeiture. He must first prove his ownership; I do not think this means absolute ownership, it is enough to shew that he is entitled to the goods in the ordinary course of commerce, for example as consignee. As soon as he has proved this the onus shifts; the Customs Department must then shew that the goods are liable to forfeiture — that is they must justify their seizure. If they fail to justify the seizure the Magistrate releases the goods; he must do so or the whole procedure would be abortive. If, however, they do justify, as, for instance, by proving that the goods were landed but not manifested, then the goods are liable to forfeiture. At this point I think the onus of proof swings back to the claimant; he must explain the circumstances so as to satisfy the Magistrate that forfeiture would be unjust or unduly harsh. In a case of mistake or mishap, the Magistrate would certainly not forfeit; in other cases he must use his discretion. Proceedings under this sub-section are rare.

Section 108 (vi) empowers the High Commissioner to release any goods seized, whether they have been forfeited or not. This is a power reserved to the Executive to deal with special cases on grounds of clemency or policy. It is not limited to cases under section 108. It is intended as a last resort; all other remedies, such as appeal and application to the Comptroller, ought to be exhausted before recourse to the High Commissioner is sought.

Every section of an Ordinance is a substantive enactment in itself and takes effect as such. It is independent unless, as sometimes happens, express words make it subject to some other provision. The same cannot be stated of sub-sections. A sub-section may be limited by its context or it may be an independent provision.

Sub-section (vi) of section 108 is an independent provision and ought to be a separate section.

Sections 106 and 108 are independent sections dealing with different situations. Section 106 (i) relates to all possible instances of seizure. Section 106 (ii) relates to forfeitures in prosecutions; it authorises forfeiture of all goods in respect of which an offence has been committed by somebody. I think these should have been two separate sections but that does not affect their construction.

Section 108 deals with all goods which have been seized but not forfeited by a Court. It expressly includes cases where there was a prosecution but no forfeiture and cases where there was no prosecution. If such goods are not released by the Comptroller, the matter must be litigated. In both sections the question is one of forfeiting private property to the Treasury. The words are "An order of forfeiture may be made" (by the Magistrate) and "The Magistrate may order (the goods) to be forfeited." These expressions have exactly the same meaning which is that the goods are forfeitable at the discretion of the Magistrate which is to be exercised on judicial principles with regard to all the circumstances of each case. Where he releases goods he may, of course, require duty to be paid.

In general forfeiture follows proof of an offence; it is associated with a fine and must be considered on the same principles. It must not be ruinous; it must be proportionate both to the offence and to the means of the accused; some regard must also be paid to the need for deterrents and protection of the public revenue. These principles apply under both sections, though perhaps with some modification under section 108 where there is no accused. Their application under section 106 may be illustrated by pending cases. In Soong Chee Kong's case, in which the main arguments were delivered, the accused had a good character and the Magistrate considered a deterrent necessary; he forfeited the watches, valued at $5,300, and in view of that he imposed only the minimum fine, which he calculated (wrongly) at $3,500 — a total of nearly $9,000. I think the Magistrate treated it as a case of actual smuggling, instead of as a case of dealing in questionable goods.

There is a point here of possibly wider application. Both the maximum and the minimum fines under section 114 are determined with reference to the duty alone not with reference to the value plus duty. Say a man is caught smuggling some bulky produce on which the duty is 2½% *ad valorem*. The maximum fine, twenty times the duty, is only half the value. If the goods are forfeited also it means that the total punishment is treble the maximum fine. In the case of goods such as these watches on which the duty is 15%, forfeiture adds only one-third to the maximum fine. It is therefore anomalous and wrong in principle to commence by forfeiture and then consider what the fine should be. The Magistrate should first consider the nature and circumstances of the offence; then he should take the value and the duty — in round figures — and see what the minimum and maximum fines are and what the practical effect of forfeiture will be. Then, if he thinks a low fine adequate, he need not forfeit.

In general forfeiture will not be ordered in respect of a mere breach of regulations but release will be subject to payment of any duty which may be unpaid. In general forfeiture will be ordered where the offence is one of actual smuggling but even there a distinction may be drawn between forfeiting the goods and forfeiting the vehicles. In the wide range of intermediate cases discretion will be exercised.

The present case is, in my opinion, an intermediate one. I think the Magistrate took too severe a view. His fine, however, does not comply with the law; the true minimum is nearly $5,000. I accordingly rectify the fine to one of $5,000 but I annul the forfeiture and direct release of the watches to the accused on payment of the duty.

It is convenient to deal here with another appeal, which was heard separately but adjourned to the same date for argument as to forfeiture. The accused were the owner and agent of a firm dealing in textiles. They bought a parcel of cloth in Singapore and declared their cost price as the value for import duty. The Customs officers considered the goods undervalued and, suspecting that the invoice was not genuine, detained the cloth. After enquiry they prosecuted the accused for signing an untrue declaration and for fraudulently attempting to evade import duty.

The cloth was declared at sixty cents a yard. The textiles officer of the Customs Department gave evidence that in his opinion it was worth $1.25 to $1.30 a yard at the time of import; that he was not aware of any marked fluctuations in local prices and valued the goods at only two cents less at the date of the trial which was three months after import; that the accused had supported their declaration at the time of import by an invoice in which the goods were correctly described and charged at sixty cents and that he had tried in vain to trace the sellers in Singapore. Another prosecution witness valued the cloth at the date of the trial at less than $1.00 a yard.

The defence produced the actual seller and also other witnesses who proved that a day or two before the sale, information, or a rumour, of an impending large release of Japanese textiles had caused a very sharp fall in the Singapore piece-goods market; one dealer had refused to buy these very goods at under $1.00 and the seller to the accused had been hard pressed for ready money at the time.

It was clear that the suspected invoice was genuine and the accused were rightly acquitted on the charge of fraud. On the charge of making an untrue declaration the Magistrate accepted the textile officer's valuation; he held that the accused had declared the goods at less than half their value and that the undervaluation was due to "lack of all reasonable care"; he forfeited the cloth, which in his view was worth nearly $4,000, and imposed a fine of $350 on each of the accused. The maximum fine is $1,000 but the offence is punishable with imprisonment without the option of a fine.

What was the true nature of this offence? The main contention at the trial was as to the value of the goods. Value is always in part a matter of opinion and in part a question which of the various methods of valuation is applicable. For the purposes of the Customs Enactment "value" is defined in section 2 as the price an importer would pay for the goods if delivered in bond, freight and insurance paid, at the place of import; the definition contains no reference to cost. In effect it is the estimated wholesale market value, less duty. This means that if a man obtains an exceptional bargain he must pay duty on the value, not on his cost price.

The importer is required to fill in a customs form in which he declares the value and to produce the invoice. I doubt whether the invoice is required by law but it is the ordinary commercial document from which the necessary particulars are taken and it is usual for the customs officers to refer to it when examining the goods.

Apart from violent fluctuations or exceptional bargains the actual price of the goods, plus insurance and freight, would correspond very closely to the

import value, as defined, and I think it is usual for merchants to base their declarations on the invoice price.

The accused in this case followed the routine. The official printed form requires the importer to declare the "C.I.F. value". Now C.I.F. is a very common commercial abbreviation for cost, insurance and freight. Merchants speak of C.I.F. price. I have never previously heard the expression "C.I.F. value" and the Deputy Public Prosecutor was quite unable to explain what, if anything, it means. It certainly does not comply with the Enactment. Any ordinary importer would take it to mean C.I.F. price which, as I have explained, comes to the same thing as the value nine times out of ten, but may on occasion be very materially different. The form ought to be amended.

I do not think that the accused were misled by the expression "C.I.F." in the form but I think that the prosecuting officer was misled because he inserted it in the charge.

The accused were actually charged with making an untrue declaration of "the C.I.F. value" but they had not done so. In strictness they had not declared their C.I.F.; they had declared their cost. But one or two cents a yard would cover the insurance and freight and this difference has no bearing on the prosecution. In effect they were charged with falsely stating their cost when in substance they had truly stated their cost.

In his closing address — after it had been shewn that the invoice was true — the prosecuting officer argued that it was the value, not the price, which was untruly declared. In his written judgment the Magistrate ignored the invoice and dealt with the case on the footing of value alone but I do not think he appreciated that the accused had never at any time been called upon to declare the local market value. There was no suggestion that the Customs officers had taken any statement from either of the accused at the time of import. No one had ever said to them, "whether this invoice be true or false is not the main point — what do you say is the Kuala Lumpur market price to-day?" If the charge had been more accurately framed — if it had contained some such words as " . . . . an untrue declaration of the estimated local market value . . . . . " the defence would have had an opportunity to adduce local evidence.

I think that the prosecution changed their ground and that they did so too late. Further, the Magistrate "after consideration of all the evidence in this case had no hesitation in accepting the evidence of the textile expert as to the value of the material." He accordingly held that the value declared was less than half the true value. He also held that "There had been a lack of all reasonable care on the part of the accused." On both these points there was misdirection. No doubt the expert witness is a gentleman of the highest repute and integrity but in his present position he is probably not in such close touch with market fluctuations as those actively engaged in the trade. Two other prosecution witnesses, who are dealers, valued the cloth at under $1.00 and there was considerable defence evidence of the slump in Singapore ten days before the importation.

On the evidence as a whole the Magistrate was not justified in accepting the expert's valuation; at the very least he should have held that there was grave doubt as to whether it was not too high. There is no evidence whatever of any negligence on the part of the accused. They merely did what was usual. The trouble arose because the circumstances were unusual. It was a case of sudden slump or exceptional bargain but it was not treated as such in the early stages.

Had the case been presented from the start on what subsequently turned out to be the correct basis — that is, had they been explicitly charged with under-declaring the local market value, irrespective of the invoice — they might still have been convicted but the offence, if any, would have appeared less serious and I do not think the Magistrate would have forfeited the cloth. It is impossible to say that they would have been convicted because the defence might have been different. The convictions must therefore be quashed, the forfeiture annulled, and the fines refunded. The cloth may be released on payment of the duty which must be assessed on the estimated value as at 20th February, 1950, with regard to the effect, if any, on the Kuala Lumpur market of the slump in textiles which occurred in Singapore about 10th February.

Two other cases involving forfeiture came before me while this judgment was pending but the facts were not of special interest and the points of law are covered by what I have already said. I consolidated these cases because, in view of the conflicting decisions, the Law officers expressly asked for a considered and, if possible, a comprehensive judgment on the question of forfeiture. I have not, however, expressed my view on any point which was not argued. The doctrine that although goods can lawfully be seized on mere suspicion, they must be forfeited even though no offence in fact occurred, and that release can be granted only by the High Commissioner, if seriously applied, would soon lead to unendurable congestion. If, on the other

hand, my construction of the Ordinance is conscientiously followed it will be found not only that the revenue will be protected but also that overlapping and conflict between the different authorities will rarely occur.

Fine varied and forfeiture annulled in the first appeal.

Convictions quashed and forfeiture annulled in the second appeal.

X v. PUBLIC PROSECUTOR.

[Court of Appeal (Foster-Sutton, C.J., Taylor and Wilson, JJ.) January 10, 1951]

[F.M. — Criminal Appeal No. 74 of 1950]

Evidence Ordinance, 1950, ss. 11(b) and 14 — When facts not otherwise relevant become relevant — Intention.

While it is not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of a criminal act other than that covered by the charge, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct to have committed the offence for which he is standing his trial, the mere fact that the evidence adduced tends to shew the commission of another offence does not render it inadmissible if it be relevant to an issue before the Court, and it may be so relevant if it is indicative of a state of mind, such as intention.

CRIMINAL APPEAL.

P. P. Nair for the appellant.

A. M. Webb for the respondent.

The facts appear sufficiently from the judgment of the Court which was delivered by :—

Foster-Sutton, C.J. : — The appellant in this case was charged and convicted under Regulation 4C(1) of the Emergency Regulations, 1948.

The case for the prosecution was that the appellant, who was a tapper on an estate in Johore, on or about the 14th October, 1950, went to the bungalow of a member of the staff of the estate, and told him that the bandits came and wanted some money from him, that the appellant first asked for 10% of his salary and, when told by him that he had no money, the appellant then asked him to give at least $10, and that when he refused to do so the appellant insisted that he should give $10 on pay-day.

Evidence was led by the prosecution to shew that the appellant consorted with bandits who visited the same estate on the 27th October, 1950, and that during their visit he aided and abetted them. This evidence was admitted after a submission by the Deputy Public Prosecutor that it was admissible under section 11(b) of the Evidence Ordinance, 1950, as going to shew that the money demanded was, in fact, intended for the use of the bandits.

On hearing of this appeal Mr. Nair, on behalf of the appellant, submitted that the evidence as to the latter incident was inadmissible as it tended to shew that the accused had been guilty of a criminal act other than the one covered by the charge, that the two acts did not form part of the same transaction and that an interval of fourteen days is too remote, alternatively, "that if the evidence was admissible on any technical ground it should not have been admitted because it was too prejudicial to the accused".

While it is not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of a criminal act other than that covered by the charge, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct to have committed the offence for which he is standing his trial, the mere fact that the evidence adduced tends to shew the commission of another offence does not render it inadmissible if it be revelant to an issue before the Court, and it may be so relevant if it is indicative of a state of mind, such as intention.

Under section 11 of the Evidence Ordinance facts not otherwise relevant are declared to be relevant "if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable", and section 14 of the Ordinance provides that facts shewing the existence of any state of mind, such as intention, are relevant when the existence of any such state of mind is in issue or relevant.

In order to make out their case, the prosecution had to satisfy the Court, *inter alia,* that the money demanded by the appellant was intended for the use of persons who intended or were about to act or had recently acted in a manner prejudicial to public safety or the maintenance of public order.

In our opinion, the evidence which was led as to the conduct of the appellant during the incident which took place on the 27th October, 1950, makes it highly probable that his statement regarding his object in making the demand correctly represented his intention at that time.

We are also of the opinion that his conduct on the occasion of the second incident was relevant as

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Note: — The trial of this case was heard in camera. All names have, therefore, been omitted from the published judgment. — Ed. M.L.J.